

Understanding social dumping in the European Union

SUMMARY

Although a recurring term in discussions related to working mobility, wages and the social security of workers, social dumping has neither a generally accepted definition, nor easily definable limits. It is rather a set of practices on an international, national or inter-corporate level, aimed at gaining an advantage over competitors, which could have significant negative consequences for economic processes and workers' social security. Examples include actions taken by actors from 'low wage' Member States to gain market advantage over actors from Member States with higher pay and social standards; multinational companies from 'high wage' countries searching for ways to avoid legal constraints by employing subcontractors from low-wage countries; and companies engaging cheaper and more vulnerable temporary and agency workers, or relocating production to lower wage and less regulated locations. Social dumping takes different forms in different sectors.

Suppressing social dumping is a component of different regulations on working mobility, undeclared work, and the status of transport workers. However, as the legislative competence of the European Union is limited in the labour law domain, soft law and social dialogue are also used to tackle the phenomenon. Several cases before the Court of Justice of the EU (such as the *Viking* and the *Laval* cases) show that the applicable EU rules can only be effective if adequate implementation and enforcement by the Member States is guaranteed.

In September 2016, the European Parliament adopted an own-initiative resolution on social dumping, calling for a number of actions to reinforce controls, close regulatory gaps, revise working conditions and promote social convergence.



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Introduction

Social dumping (as with '[unfair competition](#)' or '[welfare tourism](#)') is a term increasingly frequently used in public discussion and often applied pejoratively, as a way of condemning companies that seek to maximise profit through lower labour costs in another Member State, or within the same country or company. In the EU internal market, characterised by the free movement of persons, goods, capital and services as fundamental rights, the exploitation of diverging labour standards can be a potential source of competitive advantage. This practice is often perceived as social dumping.

Definitions of social dumping

Despite increasing usage of the expression 'social dumping', there is no clear, universally accepted definition of the term.

The academic [definitions](#) of social dumping are manifold, capturing different aspects of the phenomenon (for instance economic, social, or fiscal). Vaughan-Whitehead (2003) points out that there is a difference between a narrow definition of social dumping, limited to respecting or failing to respect the law, and a more general definition, based on the notion of 'unfair competition'.¹ A 2014 [study](#) from the European Trade Union Institute (ETUI) described social dumping as 'the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining competitive advantage'.

It is difficult to establish the limits of social dumping; 'competitive advantages through lower wages and inferior employment standards' is in itself not a sufficient criterion to allege social dumping. According to the book '[Market Expansion and Social Dumping in Europe](#)', to determine whether a certain type of behaviour constitutes social dumping, one needs to consider the intentions behind the actor's actions (for example, to gain short-term advantage over competitors); that is, it is necessary to focus on mechanisms instead of visible manifestations. This could allow for the identification of seemingly distant phenomena under a common umbrella.

According to the 2015 [definition](#) of the economist André Sapir, social dumping is 'downward pressure on social conditions due to competition from countries with lower social conditions'.

In the context of the discussion on [posted workers](#), the European Commission described this practice as a situation 'where foreign service providers can undercut local service providers because their labour standards are lower'. There are, unavoidably, differences between Member States in terms of direct or indirect labour costs. These can give companies based in countries with comparatively lower costs (wages, bonuses, allowances) and standards (social protection, healthcare, insurance) a competitive advantage.

On 14 August 2015, Marianne Thyssen, European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, [answered](#) a written [question](#) from the European Parliament on definitions, stating: 'There is no definition of the concept of "social dumping" in EC law. The term is generally used to point to unfair competition due to the application of different wages and social protection rules to different categories of workers'.

Misconceptions related to social dumping

There are some frequent stereotypes or misconceptions related to social dumping. Firstly, one has to bear in mind that social dumping is not exclusively generated by actors coming from 'new' Member States² or 'low wage' older Member States. Often,

multinational companies originating from 'high wage' countries search for ways to avoid legal constraints and introduce social dumping at lower levels of the production chain (occupied by subcontractors from low-wage third countries or Member States, or migrant workers).

Secondly, social dumping is not only a strategy at company level: workers themselves can also participate in 'the race to the bottom' by accepting disadvantageous conditions. In other cases, governments themselves reduce corporate taxes, and make labour markets more flexible in order to attract investors.³

Thirdly, although social dumping is in many cases a transnational phenomenon (as disparate traditions and regulations facilitate disloyal practices), it can also be observed at national or company levels, for instance through the engagement of cheaper and more vulnerable temporary and agency workers.

Varieties of social dumping and concerned sectors

Varieties of social dumping

There is not only a large variety of definitions, the phenomenon of social dumping itself is also far from being homogenous. According to a study⁴ carried out by Berentsen and Lillie, it can be classified in a 'norm-based' manner (for example, breach or circumvention of wage norms, abuses concerning working time or non-wage benefits, as well as security and safety standards), or in a 'process based' manner, depending on ways in which the actors comply with EU and national regulatory systems. In this respect, one can distinguish between three types of social dumping:

- **Regulatory evasion:** formal national industrial relation rules are violated and the violation concealed from the regulatory authorities, making it difficult to check whether the employment conditions meet the standards (for instance, employees are hired in a different national jurisdiction to that in which the work is performed).
- **Regulatory arbitrage:** this practice is based on the exploitation of differences between national systems within the constraints of EU rules and corresponding national rules (for instance, firms locate themselves and post employees so as to benefit from the differences between national security systems in the EU).
- **Regulatory conformance:** firms comply with the regulatory framework but manipulate rules for cost advantage (for example, by claiming that there are no skilled local workers available). Another example of this practice is the zero-hour contract, which automatically restarts after forced working breaks.

It is also possible to distinguish between illegal and legal social dumping, even though it is often difficult to define the limits. In the first case, written rules are breached, and in the second, practices respect the law but disregard informal social norms.

A special case of social dumping is related to the relocation of production in lower wage or less regulated locations (generally in third countries, or in Southern or Central-Eastern EU regions).

Social dumping in different sectors

Some sectors are particularly subject to social dumping. These include road transport, construction, and steel and automotive industries, but dumping also occurs in the Information Technology (IT) and hospitality sectors.⁵ Social dumping appears in different forms, depending on the sector. In sectors where trade unions are powerful, such as the

construction sector, breaches of collective agreements can occur through subcontracting arrangements and the recourse to recruitment agencies. In more 'de-unionised' sectors, for instance hospitality, an 'informal work culture' can be observed (no collective bargaining, non-compliance with existing employment regulations).

Social dumping in EU legislation

Free movement of workers

Citizens of the European Union have authorisation to live and work in another Member State since the [Treaty of Rome](#) (1957). Workers have the right to reside with their families in the new host country and to be treated on an equal basis to citizens of the host country. The coordination of social security schemes was one of the first regulated fields of EU-level cooperation. It is based on the principle that workers moving in the EU are subject to only one social security scheme. According to [Regulation \(EC\) No 883/2004](#), this is the scheme of the host country for the self-employed and workers hired directly by host country firms; for posted workers,⁶ the home country scheme applies.

Figure 1 – Social policy fields relevant for the movement of workers

Category/issue	Social security (Regulation 883/2004 & Regulation 987/2009)	Working conditions and pay
1. EU citizens	As nationals	As nationals (national legal and bargaining frame)
2. Self-employed EU citizens	As nationals	As nationals (not regulated)
3. Posted workers	Home country	Directive 96/71

Source: J. Cremers: EU economic freedoms and social dumping, in M. Bernaciak: [Market Expansion and Social Dumping in Europe](#), 2015, p.175.

The [2006 Services Directive](#), transposed in 2009, aims to remove barriers to trade in services in the EU, by simplifying administrative procedures for service providers; enhancing the rights of consumers and businesses receiving services; and fostering cooperation among EU countries. The directive covers a wide range of services including: retail and wholesale trade in goods and services; the activities of most regulated professions such as legal and tax advisers, architects and engineers; construction services; business-related services such as office maintenance, management consultancy and event organisation; and tourism and leisure services.

European labour law

The EU has limited competence in the field of labour law. The [Treaty on European Union](#) contains provisions enabling the EU to act to facilitate the free movement of workers, and [Article 137](#) of the Treaty establishing the European Community allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work between men and women. In other areas of labour law, legislative competence is limited, and therefore soft law techniques or social dialogue have to be used. Introduced by the [Treaty of Maastricht](#) in 1992, the social dialogue includes representatives of the two sides of industry (management and labour). The agreements concluded between the two parties may be given force of law through a Council decision.

Enforcement problems

The applicable EU rules can only be effective if adequate implementation and enforcement by the Member States is guaranteed.⁷ In addition, issues such as the authenticity of the recruiter or the existence of an adequate employment contract and the compliance of the latter with the corresponding working conditions, have not always been sufficiently controlled. Another problematic point is the degree to which collective action may be used to resist social dumping.

Cases before the Court of Justice of the EU

In several cases (amongst others, the [Viking](#) and [Laval](#) cases – see box), the Court of Justice of the EU (CJEU) was asked to clarify the extent to which collective action may be used to resist social dumping within the EU. The judgments of the Court met with widespread condemnation from labour law experts, who claimed that the Court failed to give due regard to the respect of human rights and placed business freedom above the interests of working people.

The Viking case

Viking Line ABP, a ferry operator registered under Finnish law ran regular services on the route between Tallinn and Helsinki. In 2003, the company sought to reflag its vessel by registering it in Estonia, to avoid the higher wages applicable under a collective bargaining agreement governed by Finnish law with the Finnish Seaman's Union (FSU). This had caused Viking to run its services at a loss on the above-mentioned route. The International Transport Workers Federation's (ITWF) policy was to oppose such 'reflagging' for convenience by companies registering their ship abroad in a low labour cost jurisdiction, when their real headquarters are in another country. A member of the ITWF, the FSU, planned industrial action: the ITWF told its partners not to negotiate with Viking and to hinder its business. Viking Line ABP responded by seeking an injunction in the English courts, claiming that the industrial action would infringe its right to freedom of establishment. The CJEU held that, although it was for the national court to ultimately answer the question, it was possible that collective action taken by workers to protect their interests could be unlawful because it infringed the employer's interests under Article 56 TFEU.

The Laval case

In 2007, the Latvian company Laval Un Partneri Ltd won a tender from the Swedish government for construction work at a school in the town of Vaxholm. They posted workers from Latvia to Sweden to fulfil the contract. These workers earned much less compared to Swedish workers. The Swedish Building Workers' Union started negotiations with Laval in order to sign its collective agreement with regard to wages and other working conditions (which contained more favourable conditions, as required by the Posted Workers Directive). Laval refused the contract and instead signed a collective agreement in Latvia. Swedish trade unions took action by blockading the construction site. CJEU held that the 'right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest', which could justify an infringement of free movement of services. However, in this case, it did not, because the systems for Sweden's collective bargaining (on a case by case basis) was viewed to be not 'sufficiently precise and accessible' for the company to know its obligations in advance.

EU activities to counter social dumping

European Commission

The prevention of social dumping is an important concern for the Commission and as such, it appears in different legislative acts on working mobility, undeclared work or services. The [posting of workers](#)⁸ is an area strongly affected by social dumping. The [Posting of Workers Directive](#) (Directive 96/71/EC, adopted in 1996 and in force since

December 1999) provided a first framework to protect the social rights of posted workers and to prevent social dumping. Member States have to ensure that posted workers are subject to the host country's laws, regulations and administrative provisions concerning:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- conditions for hiring out workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth; of children and of young people;
- equal treatment between men and women and other provisions on non-discrimination.

Following an [impact assessment](#) carried out in 2012, which pinpointed the shortcomings of the directive, as well as a European Parliament [resolution](#), the Commission came up with a proposal in March 2012 for an [Enforcement Directive on Posted Workers](#), seeking to improve the implementation and enforcement of the existing Posting of Workers Directive, without changing its provisions. The Directive (2014/67/EU) was adopted by the Parliament and Council in May 2014. Improvements include:

- increased worker and company awareness of their rights and obligations as regards the terms and conditions of employment;
- improved cooperation between national authorities in charge of posting;
- clarified definition of posting, so as to increase legal certainty for posted workers and service providers (while at the same time dealing with the issue of 'letter-box' companies that use posting to circumvent the law);
- defined Member States responsibilities to verify compliance with the rules laid down in the 1996 Directive (designation of specific enforcement authorities responsible for verifying compliance; necessary supervisory and enforcement measures for service providers established in the Member State);
- improved enforcement of rights and the handling of complaints, by requiring both host and home Member States to insure posted workers, with the support of trade unions and other interested third parties;
- ensure that administrative penalties and fines imposed on service providers by one Member State for failure to respect the requirements of the 1996 Directive can be enforced and recovered in another Member State.

The [targeted revision of the Posting of Workers Directive](#) proposed by the European Commission in March 2016 should effect content changes in the directive in three main areas: the remuneration of posted workers (making pay equal to that of local workers, even when subcontracting), more coherent rules on temporary agency workers, and long-term posting. Rules on remuneration and allowances that are applied to local workers in the host Member State would also have to be granted to affect posted workers (with a contract from another Member State). Remuneration would thus not only comprise the minimum rates of pay, but also other elements such as bonuses or allowances (if applicable). In order to ensure equity and transparency, Member States would be required to specify the different constituent elements of remuneration on their territory. In addition, the proposal would ensure that national rules also apply to temporary workers hired out by temporary agencies established in the Member State where the

work is carried out. Further to the protocol on the application of the principles of subsidiarity and proportionality, 11 national parliaments submitted a reasoned opinion.⁹ On 20 July 2016, after careful consideration of the Member States' views, the European Commission [concluded](#) that the proposal for a revision of the directive does not constitute a breach of the subsidiarity principle and decided to maintain it.

The 2008 [Directive on Temporary Agency Work](#) delineates a general framework related to the working conditions of temporary workers in the European Union. The Directive's aim is to guarantee a minimum level of protection for temporary workers and to contribute to the development of the temporary work sector, which could be a flexible option for employers and workers. The directive sets out the principle of non-discrimination, as regards the essential conditions of work and of employment, between temporary workers and workers recruited by the user company.

Social dumping has also been under discussion in the context of undeclared work. Mid-2016, following a [proposal](#) of the European Commission, a [European platform against undeclared work](#) was set up, tasked with supporting and coordinating Member States' efforts in preventing, deterring, and fighting undeclared work. The platform's aim is to improve technical and administrative cooperation between different Member States' enforcement authorities at EU level to prevent and deter undeclared work, including falsely declared work and bogus self-employment, more efficiently and effectively. Another aim is to avoid the deterioration in the quality of work, to ensure health and safety at work, and to facilitate the exchange of best practices.

European Parliament

On 14 September 2016, the Parliament adopted a [resolution](#) on social dumping in the European Union which calls for a number of actions to limit social dumping, such as:

- reinforced controls, cross-border cooperation, and coordination between EU Member States to ensure a level playing field, fair competition and mutual assistance between Member States across the EU;
- addressing regulatory gaps in enforcing the principles of equal pay and equal social protection, amongst others by eliminating legal shortcomings identified in the current rules and addressing risks related to long subcontracting chains;
- combating social dumping for mobile workers in the transport industry, for instance through increased monitoring of the implementation of working time and rest time rules in the road transport industry, by revising the working conditions in the aviation and the shipping services, as well as via the creation of a European Road Transport Agency; and
- promoting social convergence, amongst other things, through specific measures to help women affected by social dumping; by encouraging respect for, and the promotion of, collective bargaining; and by further controlling temporary agencies sending domestic workers to other Member States.

In other cases, Parliament adopted resolutions and decisions on the working conditions of transport workers, such as [Directive 2013/54/EU](#) of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006. With this directive, the Parliament aims to bring the Maritime Labour Convention closer to EU law, with the aim being to reduce social dumping for seafarers.

Stakeholders' views

Social dumping is a major concern for trade unions. In 2011, the European Trade Union Confederation (ETUC) launched a [consultation](#), to prepare a pan-European drive against wage and social dumping. Amongst other things, they intended to publish a 'black book' revealing instances of social dumping in the Member States.

In the automotive industry, actors try to end social dumping by putting [Transnational Company Agreements](#) (TCAs) in place, an instrument guaranteeing minimum social standards, as well as information and consultation rights. Other social partner organisations, including those in construction, the food industry and transport sectors, have also been developing initiatives in this field.

The business community and employer organisations are also concerned about the issue. In its [2012 Annual Report](#) the European Construction Industry Federation (FIEC) emphasised that prevention of social dumping was decisive for the sector's competitiveness.

Main references

Bernaciak, M., et al.: [Market Expansion and Social Dumping in Europe](#), 2015.

Buelens, J., Rigaux, M., et al.: [From Social Competition to Social Dumping](#), 2016.

Endnotes

¹ D. Vaughan-Whitehead, EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model, Edward Elgar Publications, Cheltenham, 2003.

² Member States which joined the EU in 2004 and after: Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia.

³ L. Berentsen and N. Lillie, Varieties of social dumping in a pan-European labour market, in: M. Bernaciak: Market Expansion and Social Dumping in Europe, 2015.

⁴ Ibid.

⁵ The [hospitality sector](#) includes hotel and restaurant industries, as well as art and entertainment services.

⁶ A European Commission [proposal](#) for the revision of the existing social security coordination was published on 13 December 2016, as a part of the labour mobility package.

⁷ There are already problems at Member State level: the 2014 Posting of Workers Enforcement Directive had been implemented by only 15 Member States by the deadline of 18 June 2016.

⁸ A [posted worker](#) is legally employed in a given Member State and is sent by their employer to work temporarily in another EU Member State (where the employer is providing a service).

⁹ Bulgaria, the Czech Republic, Denmark, Estonia, Croatia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia.

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